

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the
Commission's Own Motion into the Operations,
Practices, and Conduct of San Francisco
Municipal Transportation Agency, Regarding
Ongoing Public Safety Issues.

Investigation 14-01-005
(Filed January 16, 2014)

MODIFIED PRESIDING OFFICER'S DECISION

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MODIFIED PRESIDING OFFICER'S DECISION**Summary**

This decision finds that San Francisco Municipal Transportation Agency (SFMTA) violated the terms of a 2012 settlement agreement reached between SFMTA and the California Public Utilities Commission's Safety and Enforcement Division, which was approved by the Commission in Decision 12-05-016. A penalty of \$10,000 is imposed but stayed pending compliance with remedial oversight plan. This decision also finds that SFMTA violated our safety inspection regulations and imposes a fine of \$10,000. Due to the importance of compliance with our safety inspection regulations, the public interest does not support staying this second fine. SFMTA must pay this fine to the General Fund within 30 days of the effective date of this decision. This proceeding is closed.

1. The Order Instituting Investigation

The Commission opened this formal investigation to determine whether the San Francisco Municipal Transportation Agency (SFMTA) had violated the California Public Utilities Code, the Commission's General Orders (GO) 164-D and 143-B, as well as the terms of a 2012 settlement agreement reached between SFMTA and the California Public Utilities Commission's Safety and Enforcement Division (SED), as set forth in Decision (D.) 12-05-016 (Settlement Agreement).

Since the Settlement Agreement went into effect, SED stated that it has regularly monitored SFMTA's compliance with that agreement and alleged that SFMTA has failed to implement its own blue flag/blue light safety procedures as required in the Commission adopted Settlement Agreement. SED explained that blue flag/blue light procedures require SFMTA employees to place a blue flag or illuminate a blue light in close proximity to locations where they will be working underneath or on a particular vehicle, or otherwise working in a location where

moving the vehicle would endanger them. This would alert other employees who might otherwise move a vehicle that someone is working on or underneath a vehicle. Such measures are common in light rail, fixed rail guideway, and other rail and railroad systems throughout the country.

In addition to potential violations of the blue flag/blue light procedures established in the Settlement Agreement, SED also alleged that its enforcement inspectors were initially denied access to a SFMTA facility during an inspection. SED alleged that was a violation of Public Utility Code and General Order provisions requiring Commission access to SFMTA's facilities.

2. Clarification Session and Scoping Memo

On April 17, 2014, the assigned Commissioner and Administrative Law Judge (ALJ) convened a prehearing conference in this matter, and determined that a clarification session would enhance the parties' understanding of the issues and evidence to be presented in the proceeding. ALJ Jessica T. Hecht was assigned to mediate the clarification session, which was held on May 2, 2014.

The parties subsequently filed and served a document entitled "Parties Joint Proposal for Issues in Proceeding," which set forth a list of non-disputed facts, with an attached letter from SFMTA, dated December 17, 2013, which had attachments of its own.

The list of non-disputed facts provided by the parties is copied here:

1. The 2012 Settlement Agreement between the Commission's SED and the San Francisco SFMTA approved by the Commission in D.12-05-016, states that "SFMTA agrees to comply with its Standard Operating Procedures related to blue flag safety as they currently exist or may from time to time be revised";
2. On Sunday, October 6, 2013, SED's Rail Transit Safety Staff inspectors (inspectors) conducted an unannounced inspection

of SFMTA's Vehicle Maintenance Facility, SFMTA Metro East (facility);

3. On October 7, 2013, SED sent SFMTA's a document titled "Rail Transit Operations Safety Section Inspection Form" (Inspection Form). The Inspection Form is attached hereto as Attachment I; and
4. On December 17, 2013, SFMTA transmitted a letter to SED dated December 17, 2013, regarding the October 6, 2013 inspection. Attached to the letter was a document titled "Blue Light/Blue Flag Log Sheet" that had a date written in of October 6, 2013. The December 17, 2013 letter and attachments were attached to the May 2, 2014 filing.

On June 12, 2014, assigned Commissioner Peterman issued her scoping memo and adopted the non-disputed facts as set forth above for this proceeding.

Also in their joint filing on May 2, 2014, the parties listed six disputed issues, with agreed-upon wording for the first five and alternative wording for the sixth issue.

As adopted by the assigned Commissioner in the scoping memo, the six disputed issues for resolution in this proceeding are set forth below:

1. Whether SFMTA personnel failed to comply with Standard Operating Procedure SY.PR.055, Section 3.1.3 as stated in Inspection Form Finding #1 and Finding #4;
2. Whether SFMTA personnel failed to comply with Standard Operating Procedure SY.PR.055, Section 3.1.1;
3. Whether SFMTA personnel failed to comply with Standard Operating Procedure SY.PR.055, Section 3.1.2;
4. Whether SFMTA personnel failed to comply with Standard Operating Procedure SY.PR.055, Section 3.2 and 3.3;
5. Whether the above actions in Disputed Issues Number 1-4 violate Section 10 of the 2012 Settlement Agreement between the Commission and SFMTA, approved in D.12-05-016; and

6. Whether SFMTA violated California Public Utilities Code Sections 309.7(a)-(b), 314(a), 425, 771 as well as GO 143-B, Titles 14.01 and 14.02 and GO 164-D, Section 3.3 by delaying the Commission's SED inspectors access to the SFMTA Metro East facility, and whether SFMTA personnel behaved in a threatening and dangerous manner during the delay.

3. Hearings and Evidence Presented

SED presented the Mechanical Inspector and the Supervisor from its Rail Transit Safety Section to testify regarding the October 6, 2013 unannounced inspection of SMFTA's maintenance facility located at One South Van Ness Avenue in San Francisco. The Inspector and Supervisor testified that the Foreman in charge of the maintenance facility initially denied them permission to inspect the facility and that Deputy Director of Vehicle Maintenance ordered them off the property. The SED Inspector and Supervisor also testified that the Deputy Director arrived at their location in a vehicle traveling at an unsafe speed and passed near them.

After intervention by California Public Utilities Commission and SFMTA executives, the inspection was allowed to proceed on October 6, 2013. At the hearing, the SED Inspector and Supervisor presented testimony detailing the violations of SFMTA's Blue Flag/Blue Light Standard Operating Procedure that they observed and documented during the inspection on October 6, 2013.

SFMTA presented testimony from two Electrical Transit Mechanics, two Electronic Maintenance Technicians, a Transportation Safety Specialist, Chief Mechanical Officer of Rails, Electrical Transit Assistant Supervisor, and Deputy Director of Rail Maintenance, all employees of SFMTA. Their testimony explained that the alleged violations were based on erroneous interpretations of the SFMTA's Procedures, incomplete record requests, and misunderstood vehicle travel ways.

Evidentiary Hearings were held with cross-examination before the Presiding Officer on July 21, and July 22, 2014. The parties filed and served Opening Briefs on September 12, 2014, and Reply Briefs on September 26, 2014. The proceeding was submitted with the filing of Reply Briefs on September 26, 2014. The Presiding Officer's Decision was mailed on November 26, 2014.

4. Burden of Proof and Standard of Proof

In an investigatory proceeding launched by Commission staff in response to allegations of violations of applicable safety requirements, such as the instant proceeding, SED bears the burden of proof.¹

With the burden of proof placed on SED, the Commission has held that the standard of proof that SED must meet is that of a preponderance of evidence. Preponderance of the evidence usually is defined in terms of probability of truth, e.g., such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.² In short, SED must present more evidence that supports the requested result than would support an alternative outcome.

5. 2011 Investigation and 2012 Settlement Agreement

On February 24, 2011, the Commission issued Order Instituting Investigation (I.) 11-02-017, with SFMTA the respondent. There, the Commission found allegations that SFMTA had violated certain Commission General Orders, including 143-B, 164-D, and 127, state and federal codes, and SFMTA's own

¹ Communications TeleSystems International, D.97-05-089; 72 CPUC2d 621, 633-4.

² In the Matter of the Application of San Diego Gas & Electric Company for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project, D.08-12-058, *citing* Witkin, Calif. Evidence, 4th Edition, Vol. 1, 184.

procedures, neglected system maintenance, and failed to respond to Commission Staff requests and recommendations, which resulted in alleged unsafe operations. SFMTA and Commission's staff filed and served their proposed Settlement Agreement on March 21, 2012, which addressed the issues raised in the Investigation in the following areas:

1. Alleged defects with track in and around the intersection of Church and Duboce Streets;
2. Alleged abandoned operation of the Automatic Train Control System in the Sunset Tunnel in violation of GO 127;
3. Alleged deficiencies with the loop cable that provides communication required for the operation of the Automatic Train Control System in the Market Street/Twin Peaks Tunnel;
4. Correct implementation of blue flag safety procedures to protect SFMTA employee safety; and
5. Correction of inter-agency communication issues.

In D.12-05-016, the Commission found that the Settlement Agreement was reasonable in light of the whole record, consistent with the law, and in the public interest, and approved it. In doing so, the Commission described the provisions of the Settlement Agreement pertaining to blue flag procedures:

In addition, [Consumer Protection and Safety Division] CPSD has alleged that SFMTA has not properly implemented blue flag safety procedures to protect its employees. CPSD acknowledges that SFMTA has not violated any statute or General Order, while SFMTA acknowledges that such procedure is common among rail transit agencies and that such safety protocols can be effective. As CPSD acknowledges and, as set forth in Section 10 of the Settlement Agreement, SFMTA has recently adopted and implemented a blue flag

safety protocol and SFMTA agrees to comply with its Standard Operating Procedures related to these procedures.³

The Commission also expressed its support for the Settlement Agreement provisions that improve communications within SFMTA and, equally importantly, between SFMTA and the Commission's staff:

We are pleased that the Settlement Agreement goes beyond the specific issues raised in I.11-02-017 and addresses improved communication going forward, both between the agencies and within each agency. Issues related to communication between the parties were raised in both the Investigation and the Response. The parties have worked hard to open the lines of effective communication and have stated that the settlement process has improved their working relationships. The parties have memorialized a variety of ways in which they will continue to work together to foster productive working relationships in a manner that focuses on the safety of SFMTA's system. We approve of this approach, which helps to encourage the safety culture that we are striving to inculcate in all of our regulated utilities. For example, in Section 3 of the proposed Settlement Agreement, the parties acknowledge that communication needs to improve and that such efforts will lead to more effective public safety. Sections 7, 8, and 9 of the Settlement Agreement set forth specific activities that are intended to facilitate more productive communication between the parties, as we discuss below.

Section 7 discusses SFMTA's Senior Management Safety Committee. This Safety Committee meets on a monthly basis to consider implementation of the SFMTA Rail System Safety Program Plan and to discuss inspections, accidents, system modifications, and proposed hazard resolutions. The parties state that regular meetings of the Senior Management Safety

³ SED was formerly known as the Consumer Protection and Safety Division, CPSD.

Committee will help ensure that safety issues are given the required high level of management focus to facilitate the coordination of repair work and capital improvements. We concur.

Section 8 sets forth a stipulation that the Monthly Safety Coordination meetings between CPSD and SFMTA have resumed and will continue on a regular basis. These meetings will address corrective action plans, accident reports, inspection reports, and efficiency testing. Both parties acknowledge the importance of these meetings which will facilitate communication and the identification and correction of public safety issues. We are pleased that the parties are working together “to efficiently identify and resolve any hazards or other safety concerns in the SFMTA system in a mutually agreeable manner.” We agree that such meetings will allow CPSD to gain additional insights into SFMTA’s system and will allow parties to jointly discuss risk analysis, prioritization of safety issues, and problem-solving – all to the benefit of public safety.

Section 9 sets forth SFMTA’s agreement to develop and implement an efficiency testing policy to test rail operator compliance with SFMTA rules, procedures, and policies. CPSD will comment on the efficiency testing policy before it is implemented and SFMTA will include remedial action plans, including retraining as needed, as part of its policy. The parties acknowledge that this provision is not a matter that I.11-02-107 addressed, but that it is an effective method of identifying and correcting operator error, and one that is utilized by other Rail Transit Agencies regulated by this Commission. Again, we commend the parties for going beyond the allegations of the Order Instituting Investigation to address system safety in a holistic manner. We agree with the parties: since operator error can be the cause of many accidents, the efficiency testing policy, which is focused on correcting operator errors, will improve public safety and is in the public interest.

Finally, the Commission agreed with the parties that a fine or other financial penalty would not be productive, and that SFMTA's funds would be better spent on system safety improvements:

The proposed Settlement Agreement recognizes that requiring SFMTA to pay a fine or a penalty would not be in the public interest, because such an approach would reduce SFMTA's funds available to operate and maintain its transit services and programs in a safe and reliable manner. Therefore, in lieu of imposing a penalty, Section 11 of the proposed Settlement Agreement requires SFMTA to undertake several facility maintenance initiatives that the parties maintain will enhance safety for SFMTA's passengers and for the public at large. It is reasonable to approve this approach in this particular instance.

6. Appeal of Presiding Officer's Decision

On December 26, 2014, SED filed and served its Appeal of the Presiding Officer's Decision. SED contended that the Presiding Officer's Decision erred by failing to find that SED had met its burden of proving violations two through six as listed above. SED also stated that the Presiding Officer's conclusion that the SFMTA official did not violate any law or regulation by behaving in a threatening and dangerous manner undermined SED's enforcement objectives. SED argued that the Presiding Officer's decision appeared to suggest that the SED Inspectors should have abandoned their inspection efforts after being presented with difficult conditions in the field from a hostile operator. SED asked that the Commission support its employees in their efforts to conscientiously perform their duties and find that SFMTA committed a serious violation of safety regulations.

On January 12, 2015, SFMTA responded in opposition to the appeal and in agreement with the Presiding Officer's decision.

To allow time to consider the appeal, on January 15, 2015, the Commission extended the statutory deadline for this proceeding to January 16, 2016.

7. Discussion

Importance of Ensuring Rail Safety for Patrons, Employees and the Public

As provided in the Article XII of the California Constitution and the Public Utilities Code, this Commission is responsible for ensuring the safety of all persons and property transported by rail in California.

In GO 143-B, the Commission stated that the purpose of this set of rules and regulations was “to establish safety requirements governing the design, construction, operation, and maintenance of light-rail transit systems in the State of California.”⁴ The Commission also declared that the “the safety of patrons, employees, and the public is of primary importance in the application of these regulations.”⁵

In furtherance of its duties to discharge its Constitutional and statutory safety obligations, this Commission adopted GO 164, initially on September 20, 1996, and most recently updated on May 3, 2007, with GO 164-D. That General Order specifies rules and regulations governing this Commission’s safety oversight of Rail Transit Agencies and Rail Fixed Guideway Systems in California, and requires that each operator implement, and update as necessary, specific programs to ensure system safety and hazard management.

A critical component of the Commission’s rail safety program is active monitoring and oversight by our Staff of on-going rail operations. Accordingly, this Commission, acting through its Staff, can only discharge its statutory and

⁴ GO 143-B, Section 1.03.

⁵ *Id.*

constitutional obligations where the entities subject to our safety oversight jurisdiction accord our staff the respect and cooperation they need to properly do their jobs.

The important role of our Staff in achieving our objective of providing for “the safety of patrons, employees, and the public” is reflected in Pub. Util. Code § 309.7:

The division of the commission responsible for consumer protection and safety shall be responsible for inspection, surveillance, and investigation of the rights-of-way, facilities, equipment, and operations of railroads and public mass transit guideways, and for enforcing state and federal laws, regulations, orders, and directives relating to transportation of persons or commodities, or both, of any nature or description by rail. The consumer protection and safety division shall advise the commission on all matters relating to rail safety, and shall propose to the commission rules, regulations, orders, and other measures necessary to reduce the dangers caused by unsafe conditions on the railroads of the state.

The statutory authority granted to the Commission’s Staff is also reflected in both GOs 143-B and 164-D. In those General Orders, the Commission adopts regulations specifically recognizing and providing for Staff to perform inspections of rail operations as needed. GO 143-B Section 14.02, sets out the requirement that all operators: “shall afford representatives of the Commission all reasonable opportunity and facilities, to make such inspections and tests.” As discussed below, we find that SFMTA’s Deputy Director failed to comply with this requirement.

This Commission is resolutely committed to ensuring that all passenger rail operations in California adopt as their highest priority “the safety of patrons, employees, and the public,” as required by Pub. Util. Code § 309.7. To achieve this goal, we must deploy our Staff to inspect on-going passenger rail operations.

This Commission, acting through its Staff, can only discharge its statutory and constitutional obligations where the entities subject to our safety oversight jurisdiction accord our Staff the respect and cooperation they need to properly do their jobs.

The facts in this Investigation demonstrate a pattern of failure to respect and cooperate with our Staff. The record shows that our Staff's unannounced inspection of SFMTA's Metro East maintenance facility on October 6, 2013, was greeted by the squealing brakes of a Deputy Director's vehicle and an expletive-laced demand to leave the premises.

While we conclude elsewhere in today's decision that insufficient evidence has been presented to conclude that the Deputy Director's actions were severe enough to constitute violation of the California Penal Code, such a conclusion does not mean that the behavior was acceptable. We expect more from California's rail operators than a mere failure to violate the Penal Code.

We understand that unannounced inspections can be inconvenient and time-consuming. Nevertheless, rail transit professionals, especially high-ranking managers, are expected to be able to accommodate these inspections in a respectful and cooperative manner. Such inspections are part of passenger rail operations in California which high-ranking officials are expected to manage in the normal course of business.

The record in this proceeding shows that the SFMTA Deputy Director arrived at the location where the Commission's inspectors were known to be, stopped his vehicle near the inspectors in such a way as to cause rubber skidding noise from the tires and, after disembarking from the vehicle, ordered our inspectors off the premises in a loud and expletive-ridden manner.

We find that this treatment of our inspectors falls short of the standard of “all reasonable opportunity and facilities” to make inspections, as is required by GO 143-B, Section 14.02. Accordingly, we find that SFMTA violated GO 143-B, Section 14.02 by failing to provide Commission Inspectors with reasonable opportunity and facilities for the unannounced inspection on October 6, 2013. Although our Inspectors were later able to complete their work, after the intervention of senior management at the Commission and SFMTA, the necessity for such intervention is not within the scope of “all reasonable opportunity and facilities” as required by Section 14.02.

We, conclude, therefore, that SFMTA violated GO 143-B, Section 14.02 on October 6, 2013. As set forth below, we find one violation and that the proper fine is \$10,000 for this violation.

As discussed further below, we find that the public interest requires that the relationship between SED and the SFMTA improve, and that mutual efforts to increase employee and public safety become the shared objective of the two agencies.

Specific Issues Set for Hearing

We analyze each of the six substantive issues set for hearing in turn below. We find that SFMTA failed to comply with the terms of its Blue Flag/Blue Light Protection, SY.PR.055, Standard Operating Procedure Section 3.1.3 which requires that a blue flag be placed no less than five feet distant from a vehicle. Compliance with the terms of its Blue Flag/Blue Light Protection, SY.PR.055, Standard Operating Procedure Section 3.1.3 is a provision of the 2012 Settlement Agreement which was approved by the Commission in D.12-05-016. Therefore, we conclude that SFMTA has violated a Commission decision.

We also find that SED did not meet its burden of proving that SFMTA had violated other provisions of Blue Flag/Blue Light Protection, SY.PR.055, Standard Operating Procedure, or the Commission's GOs 164-D and 143-B.

Based on these findings, we conclude that the public interest requires that we impose a fine of \$10,000 on SFMTA and that such fine should be stayed pending improvement in SFMTA's compliance.

Issue 1: Whether SFMTA personnel failed to comply with Standard Operating Procedure SY.PR.055, Section 3.1.3 as stated in Inspection Form Finding #1 and Finding #4.

Section 3.1.3 requires that blue flags be placed no less than five feet in front and back of a vehicle on which personnel are working. The blue flags notify others that personnel are working on the vehicle and that it should not be moved.

In Inspection Form Finding #1, SED stated that a blue flag was less than five feet from a vehicle and, in fact, was touching the vehicle. SFMTA did not dispute this Finding.

The parties dispute the proper application of this rule where multiple vehicles are on the track and undergoing work. SED contends that the flags should be placed in front and back of each vehicle, so that flags appear in between the vehicles.⁶ SFMTA argues that the flags only need to be placed in front and back of the entire group of vehicles to indicate that the entire group of vehicles is not in service.⁷ SFMTA also contends that as the author of Section 3.1.3, SFMTA's interpretation is entitled to deference.⁸

⁶ SED Amended Opening Brief at 13.

⁷ SFMTA Post-Hearing Brief on Disputed Issues at 6.

⁸ *Id.*

As set forth above, in the 2012 Settlement Agreement, SFMTA agreed to adopt and comply with its own Standard Operating Procedures with regard to blue flags and lights. SED cites to federal blue flag regulations as the source of its interpretation that blue flags should be placed in between vehicles in a group.⁹

Importantly, SED does not cite to or explain any practical difference in worker safety achieved by placing the flags in between the vehicles, as opposed to at both ends of a group of vehicles. SFMTA's rule states that the area between blue flags is "considered protected" which means that "rail vehicle movement into and out of the protected areas is not permitted."

Therefore, we find that SED has presented undisputed evidence of a blue flag placed less than five feet distant from a vehicle in violation of SFMTA Standard Operating Procedure 3.1.3, but that SED has failed to meet its burden of proving by a preponderance of the evidence that the absence of blue flags between each vehicle in a group of vehicles constitutes a violation of SFMTA Standard Operating Procedure 3.1.3.

Issue 2: Whether SFMTA personnel failed to comply with Standard Operating Procedure SY.PR.055, Section 3.1.1.

This provision requires that SFMTA workers obtain permission from the facility "meet and greet office" prior to placing any blue flags around vehicles in the facility.

SED alleged that SFMTA was in violation of this provision because, despite repeated requests, SFMTA was unable to produce any documentation of compliance.¹⁰ SFMTA first explained that Section 3.1.1 does not require any such

⁹ SED Amended Opening Brief at 13.

¹⁰ SED Amended Opening Brief at 10.

documentation. SFMTA next explained that such a log is kept, as provided for in Standard Operating Procedure SY.PR.055, 3.3.3. SFMTA presented its Electronic Maintenance Technician Win who testified that he was the meet and greet officer on the day of the inspection and that he, in effect, granted permission for blue flag installations referenced in SED's findings because he had installed the flags himself, and recorded the flags in the log as required by 3.3.3. Attached to Hearing Exhibit 5, Win's Direct Testimony, is the "Blue Light/Flag Log" for the date of the inspection.

SED focuses on the danger to workers caused by the facility manager lacking "current and complete records of blue flag placement" in the facility.¹¹ SED points to the SFMTA's practice to leave flags in place on vehicles where work is not completed in one shift without notation on the log for subsequent shifts, and questions how a facility manager could have any confidence of the blue flag locations by just looking at a daily log.¹²

SED raises serious practical questions regarding the implementation of SFMTA Standard Operating Procedure SY.PR.055 3.0 and how these rules and protocols achieve the goal of "safe operating procedure."

The Commission's investigation and the scoping memo, however, allege a specific violation of 3.1.1, which requires obtaining permission from the meet and greet office. SFMTA has presented testimony that such permission was granted, as well as recorded in a written log as required by Section 3.3.3. SFMTA has demonstrated compliance with its rules.

¹¹ SED Amended Opening Brief at 12.

¹² *Id.*

SFMTA's compliance notwithstanding, the underlying safety issues identified by SED must be addressed. One means to do so would be the Monthly Safety Coordination meetings required by the Settlement Agreement:

Section 8 sets forth a stipulation that the Monthly Safety Coordination meetings between CPSD and SFMTA have resumed and will continue on a regular basis. These meetings will address corrective action plans, accident reports, inspection reports, and efficiency testing. Both parties acknowledge the importance of these meetings which will facilitate communication and the identification and correction of public safety issues. We are pleased that the parties are working together 'to efficiently identify and resolve any hazards or other safety concerns in the SFMTA system in a mutually agreeable manner.' We agree that such meetings will allow CPSD to gain additional insights into SFMTA's system and will allow parties to jointly discuss risk analysis, prioritization of safety issues, and problem-solving – all to the benefit of public safety.

Issue 3: Whether SFMTA personnel failed to comply with Standard Operating Procedure SY.PR.055, Section 3.1.2.

Section 3.1.2 details the information to be provided by the person requesting permission to place blue flags as required by Section 3.1.1., including number of persons on the work crew, proposed location of the blue flags, nature and duration of the activity planned in the protected area.

The blue light/flag log sheet and Incident Log & Pull-Ins attached to Hearing Exhibit 5 demonstrate compliance with this requirement. However, as discussed above, SED has raised practical implementation questions about the efficacy of these requirements. Resolving these implementation questions will require mutual and on-going cooperation between SED and SFMTA. We create a process to facilitate this important objective as set forth below.

Issue 4: Whether SFMTA personnel failed to comply with Standard Operating Procedure SY.PR.055, Section 3.2 and 3.3.

SED alleged that SFMTA employees violated Section 3.2 and 3.3 by placing and removing blue flags on vehicles that they were not working on. SED contended that their inspectors repeatedly asked to see the blue flag log sheet during the inspection but that SFMTA employees did not know “what he was referring to, what the log sheet was, or how they were supposed to be complying with the blue flag process.”¹³

The blue light/flag log sheet and Incident Log & Pull-Ins attached to Hearing Exhibit 5 demonstrate compliance with this requirement. The practical implementation questions surrounding these requirements are set for resolution through the process described below.

Issue 5: Whether the above actions described in Issues 1-4 discussed above also violate Section 10 of the 2012 Settlement Agreement between the Commission and SFMTA, approved in D.12-05-016.

As discussed above, pursuant to the 2012 Settlement Agreement, SFMTA adopted and implemented the blue flag safety protocol and agreed to comply with its Standard Operating Procedures related to these procedures. Our analysis of Issues 1 through 4 shows one admitted violation of the Standard Operating Procedures and practical implementation questions. Therefore, we conclude that SED has demonstrated one specific violation of the Standard Operating Procedures for blue flags, which is also a violation of the 2012 Settlement Agreement, and raised serious implementation issues that should be resolved through mutual efforts of the SED and SFMTA.

¹³ SED Amended Opening Brief at 16 – 17.

Issue 6: Whether SFMTA violated California Public Utilities Code Sections 309.7(a)-(b), 314(a), 425, 771 as well as GO 143-B, Titles 14.01 and 14.02 and GO 164-D, Section 3.3 by delaying the Commission's SED inspectors access to the SFMTA Metro East facility, and whether SFMTA personnel behaved in a threatening and dangerous manner during the delay.

There is no dispute between the parties that SED's inspectors were delayed in conducting their inspection, and that SFMTA initially ordered them off the SFMTA property.¹⁴ There is similarly no dispute that SED was ultimately allowed to perform its inspection, after intervention by senior management at both agencies. The record is clear that the initial stages of the inspection were not characterized by cooperation and respectful behavior, but that the inspection did proceed in a reasonable amount of time.

Therefore, we conclude that SED has not demonstrated that SFMTA violated the Commission's GOs 164-D and 143-B with its delay in allowing the inspection to proceed.

SED contends that the SFMTA Deputy Director of Rail Maintenance drove his truck at a high rate of speed near the inspectors and "threatened SED's inspectors with bodily harm."¹⁵ SED argues that this conduct meets the "elements of Penal Code Section 71" because the Deputy Director attempted to cause the inspectors to refrain from carrying out their inspection by means of a threat to inflict unlawful injury.¹⁶

¹⁴ See, e.g., SED Amended Opening Brief at 21.

¹⁵ SED Amended Opening Brief at 1.

¹⁶ *Id.* at 30.

SFMTA argues that the only reason the Deputy Director's vehicle came near the inspectors was due to the inspectors standing near the vehicular door of the maintenance facility.¹⁷

We are not persuaded that SED has met its burden of proving this exceptionally serious allegation, although we find elsewhere that the Deputy Director's behavior does violate our safety inspection regulations. SED must show that the Inspectors feared immediate bodily injury. An Inspector under threat of "unlawful injury" and that "such a threat could be carried out," as required by Penal Code Section 71, should not remain in proximity to the perpetrator and should immediately report such conduct to law enforcement authorities. We, therefore, conclude that SED has not presented substantial evidence to support a finding the SFMTA personnel violated Penal Code Section 71, however, as set forth above, we do find that SED's evidence demonstrates a failure to comply with our regulations regarding safety inspections.

8. Penalties

SED recommends a fine of \$90,000 and staff training directives, and SFMTA contends that no penalties should be imposed because any violations were minor.

As provided in Public Utility Code Section 2107, any public utility which violates or fails to comply with a Commission decision is subject to a penalty of not less than \$500 and not more than \$50,000.

¹⁷ SFMTA Post-Hearing Brief at 14.

In establishing an appropriate fine under § 2107, the Commission considers two general factors: the severity of the offense and the conduct of the utility. In addition, the Commission considers the financial resources of the utility, and the totality of the circumstances related to the violations.¹⁸ Commission precedent should also be considered when assessing fines.¹⁹

The amount of a fine imposed pursuant to Section 2107 must be proportional to the severity of the offense. Disregarding a statutory or Commission directive is accorded a high level of severity because compliance is absolutely necessary to the proper functioning of the regulatory process.²⁰

In considering the conduct of the utility, the Commission reviews the utility's efforts to prevent, detect, and disclose and rectify the violation.²¹ The size of the fine should reflect the financial resources of the utility.

In D.09-07-021, we fined the utility \$10,000 per incident for each violation of a Commission order.²² The utility failed to file four customer-complaint reports ordered by the Commission. We found that since the utility was not a repeat offender in that it had never been before the Commission for a violation of

¹⁸ Standards of Conduct Governing Relationships between Energy Utilities and their Affiliates, 84 CPUC2d 155, 182-84 (D.98-12-075).

¹⁹ *Id.* at 184.

²⁰ *Ibid.*

²¹ *Id.* 183-184.

²² Application of California-American Water Company for authorization to increase its revenues for water service in its Monterey district by \$24,718,200 or 80.30% in the year 2009; \$6,503,900 or 11.72% in the year 2010; and \$7,598,300 or 12.25% in the year 2011 under current rate design and to increase its revenues for water service in the Toro service area of it Monterey district by \$354,324 or 114.97% in the year 2009; \$25,000 or 3.77% in the year 2010; and \$46,500 or 6.76% in the year 2011 under the current rate design and current matters, 2009 Cal. PUC LEXIS 346, *120 (D.09-07-021).

this type, it would be fined \$10,000 for each violation. However, we noted that the utility's "conduct clearly undermines the proper functioning of the regulatory process because the Commission cannot identify and correct poor utility customer service without adequate data."²³ Here, the conduct of the SFMTA represents a failure to comply with regulations adopted as part of the mutually agreed-upon settlement of an earlier investigation. Our policy favors settlements, but parties must comply with the provisions of such agreements.

As set forth above, we find that SFMTA committed two violations: (1) violation of blue flag/light requirements; and (2) failure to provide reasonable inspection opportunity.

SFMTA's failure to comply with its Standard Operating Practice SY PR.055 in violation of D.12-05-016 is a single violation and should be assessed a fine of \$10,000 consistent with our precedent. For the reasons and subject to the conditions set forth below, we will stay the imposition of the fine based on the blue flag/light violation pending a demonstration by SFMTA of compliance with applicable regulations.

As set forth above, we have concluded that SFMTA violated GO 143-B, Section 14.02 on October 6, 2013 by failing to provide reasonable inspection opportunity. We find one violation and, as analyzed above, that the proper fine is \$10,000 for this inspection violation. We are generally reluctant to assess fines against other public agencies as shown in our conclusions with regard to the blue light violation. However, where, as here, the issue is compliance with our safety jurisdiction, we must exercise the full range of our enforcement provisions. Therefore, we decline to find that the public agency status of SFMTA is a

²³ *Id.* at *118.

mitigation factor, and we assess a fine of \$10,000 for this inspection violation payable to the General Fund no later than 30 days after the effective date of today's decision.

9. Improving the Regulatory Oversight of SFMTA

We find that the public interest requires that the relationship between SED and the SFMTA improve, and that mutual efforts to increase employee and public safety become the shared objective of the two agencies.

We have previously commended these same parties for addressing system safety in a holistic manner, and adopted a settlement agreement that sought to achieve that goal. Consistent with that goal, the parties proposed and we adopted a settlement agreement which recognized that requiring SFMTA to pay a fine or a penalty would not be in the public interest, because such an approach would reduce SFMTA's funds available to operate and maintain its transit services and programs in a safe and reliable manner.

In today's decision, we nevertheless adopt a penalty program that includes an immediately payable fine of \$10,000 for violation of safety inspection regulation plus a second \$10,000 fine for blue flag/light violation. We will stay imposition of the second \$10,000 fine for two years to allow SFMTA and SED to develop a more productive working relationship. If, at the end of two years after the effective date of this order, the parties have achieved this objective and no further formal investigations are initiated, the second \$10,000 fine will be rescinded.

SFMTA and SED shall mutually cooperate to immediately establish executive-level contacts between the two agencies. The contact personnel shall be responsible for creating a working group comprised of representatives from both agencies to meet and propose such actions as are necessary to amicably

resolve safety and regulatory issues, and may be operated in concert with the Monthly Safety Coordination meetings as required by the 2012 Settlement Agreement.

No later than 45 days after the effective date of this order, the parties shall jointly submit a compliance filing setting forth the composition of the working group and the identities of the executive contacts. The working group, under the direction of the respective executives, shall be responsible for developing and implementing a plan to improve safety.

One of the first issues for the working group to resolve is the serious practical safety issue identified by SED regarding the implementation of SFMTA Standard Operating Procedure SY.PR.055 3.0 for maintaining an up-to-date record of vehicles subject to blue light/blue flag protection areas in the maintenance facility.

If the parties find themselves at an impasse and believe that a mediator would be productive, the parties may contact the Director of the Commission's Alternative Dispute Resolution program within Administrative Law Judge's Division to have a mediator assigned.

No later than two years after the effective date of this order, the parties shall submit a compliance filing setting forth the status of safety enhancement efforts and whether the Commission has initiated any further formal investigations of SFMTA. The fine that has been stayed by today's decision is rescinded if SFMTA complies with the safety enhancement plan and no further formal investigations are initiated naming SFMTA as a respondent prior to the compliance filing.

This proceeding is closed.

10. Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Maribeth A. Bushey is the Presiding Officer.

Findings of Fact

1. The parties do not dispute the following facts:
 - a. The 2012 Settlement Agreement between the Commission's SED and the San Francisco SFMTA approved by the Commission in D.12-05-016, states that "SFMTA agrees to comply with its Standard Operating Procedures related to blue flag safety as they currently exist or may from time to time be revised";
 - b. On Sunday, October 6, 2013, SED's Rail Transit Safety Staff inspectors (inspectors) conducted an unannounced inspection of SFMTA's Vehicle Maintenance Facility, SFMTA Metro East (facility);
 - c. On October 7, 2013, SED sent SFMTA a document titled "Rail Transit Operations Safety Section Inspection Form" (Inspection Form). The Inspection Form is attached hereto as Attachment I; and
 - d. On December 17, 2013, SFMTA transmitted a letter to SED dated December 17, 2013, regarding the October 6, 2013 inspection. Attached to the letter was a document titled "Blue Light/Blue Flag Log Sheet" that had a date written in of October 6, 2013. The December 17, 2013 letter and attachments were attached to the May 2, 2014 filing.
2. Respondent SFMTA failed to comply with the terms of its Blue Flag/Blue Light Protection, SY.PR.055, Standard Operating Procedure Section 3.1.3 which requires that a blue flag be placed no less than five feet distant from a vehicle.
3. Compliance with the terms of its Blue Flag/Blue Light Protection, SY.PR.055, Standard Operating Procedure Section 3.1.3 is a provision of the 2012 Settlement Agreement approved by the Commission in D.12-05-016.

4. SED did not meet its burden of proving that SFMTA had violated other provisions of Blue Flag/Blue Light Protection, SY.PR.055, Standard Operating Procedure.

5. SED did not meet its burden of proving that SFMTA had violated Penal Code § 71.

6. SED met its burden of proving that SFMTA had violated the Commission's GO 143-B, Section 14.02 on October 6, 2013.

7. In the scoping memo issued June 12, 2014, the assigned Commissioner adopted the list of disputed issues to be resolved in this proceeding, and accepted the parties' list of undisputed facts.

8. SED identified serious practical safety issues regarding the implementation of SFMTA Standard Operating Procedure SY.PR.055 3.0 for maintaining an up-to-date record of vehicles subject to blue light/blue flag protection areas in the maintenance facility.

Conclusions of Law

1. The burden of proof is on SED to show by a preponderance of the evidence that respondent SFMTA violated California law or regulations.

2. SED presented substantial evidence that Respondent SFMTA failed to comply with the terms of its Blue Flag/Blue Light Protection, SY.PR.055, Standard Operating Procedure Section 3.1.3 which requires that a blue flag be placed no less than five feet distant from a vehicle.

3. Compliance with the terms of its Blue Flag/Blue Light Protection, SY.PR.055, Standard Operating Procedure Section 3.1.3 is a provision of the 2012 Settlement Agreement approved by the Commission in D.12-05-016.

4. Respondent SFMTA violated the provisions of the settlement agreement approved by the Commission in D.12-05-016 when SFMTA failed to comply with

the terms of its Blue Flag/Blue Light Protection, SY.PR.055, Standard Operating Procedure Section 3.1.3.

5. The public interest requires that the relationship between SED and the SFMTA improve, and that mutual efforts to increase employee and public safety become the shared objective of the two agencies.

6. Pursuant to Pub. Util. Code § 2107, we should impose a fine of \$10,000 on SFMTA for its violation of D.12-05-016; however, such fine should be stayed for two years to allow SFMTA and SED to develop a more productive working relationship and for SFMTA to demonstrate compliance.

7. SFMTA's fine should be rescinded if SFMTA complies with the safety enhancement plan and no further formal investigations are opened over the course of the next two years.

8. Pursuant to Pub. Util. Code § 2107, we should impose a fine on SFMTA for its violation Section 14.02 on October 6, 2013, with one violation and that the proper fine is \$10,000 for this violation, payable to the General Fund no later than 30 days after the effective date of today's decision.

9. To enhance safety at SFMTA, the parties should

- a. Mutually cooperate to immediately establish executive-level contacts between the two agencies, who shall be responsible for creating a working group comprised of representatives from both agencies to meet and propose such actions as are necessary to amicably resolve safety and regulatory issues. The working group, under the direction of the respective executives, shall be responsible for developing and implementing a plan to improve safety.
- b. No later than 45 days after the effective date of this order, the parties should jointly submit a compliance filing setting forth the composition of the working group and the identities of the executive contacts.

- c. The working group should address the serious practical safety issue identified by SED regarding the implementation of SFMTA Standard Operating Procedure SY.PR.055 3.0 for maintaining an up-to-date record of vehicles subject to blue light/blue flag protection areas in the maintenance facility.
- d. If at impasse, the parties should contact the Director of the Commission's Alternative Dispute Resolution program within Administrative Law Judge's Division to have a mediator assigned.

10. No later than two years after the effective date of this order, the parties should submit a compliance filing setting forth the status of safety enhancement efforts and whether the Commission has initiated any further formal investigations of SFMTA.

11. This decision should be effective today.

12. This proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. San Francisco Municipal Transportation Agency (SFMTA) is fined \$10,000 for violating safety inspection requirements. SFMTA must pay this fine by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 30 days of the effective date of this order. Write on the face of the check or money order "For deposit to the General Fund per Decision _____. " All money received by the Commission's Fiscal Office pursuant to this Ordering Paragraph shall be deposited or transferred to the State of California General Fund as soon as practical.

2. San Francisco Municipal Transportation Agency is fined \$10,000 for the blue flag/light violation. The fine imposed on San Francisco Municipal Transportation Agency is stayed for two years from the effective date of this decision so long as the San Francisco Municipal Transportation Agency complies with the safety enhancement plan set out below and the Commission initiates no further formal investigations of the Agency. Should the San Francisco Municipal Transportation Agency fail to comply with the safety enhancement plan set out in Ordering Paragraph 3 or the Commission initiates another formal investigation of the Agency, the fine shall be immediately due and payable as set forth herein.

3. San Francisco Municipal Transportation Agency and the Commission's Safety and Enforcement Division shall create and establish a safety enhancement plan that includes, but is not limited to, the following elements:

- a. Mutually cooperate to immediately establish executive-level contacts between the two agencies, who shall be responsible for creating a working group comprised of representatives from both agencies to meet and propose such actions as are necessary to amicably resolve safety and regulatory issues. The working group, under the direction of the respective executives, shall be responsible for developing and implementing a plan to improve safety.
- b. No later than 45 days after the effective date of this order, jointly submit a compliance filing setting forth the composition of the working group and the identities of the executive contacts.
- c. The working group shall address the serious practical safety issue identified by Safety and Enforcement Division regarding the implementation of San Francisco Municipal Transportation Agency Standard Operating Procedure SY.PR.055 3.0 for maintaining an up-to-date record of vehicles subject to blue light/blue flag protection areas in the maintenance facility.

- d. If at impasse, the parties may contact the Director of the Commission's Alternative Dispute Resolution program within Administrative Law Judge's Division to have a mediator assigned.
 - e. No later than two years after the effective date of this order, the parties shall submit a compliance filing setting forth the status of safety enhancement efforts and whether the Commission has initiated any further formal investigations of San Francisco Municipal Transportation Agency. If the compliance filing shows no further formal investigations, the fine imposed in Ordering Paragraph 1 is permanently suspended.
4. Investigation 14-01-005 is closed.

This order is effective today.

Dated _____, at San Francisco, California.